A **FOO YEE CONSTRUCTION SDN BHD**

v.

VIJAYAN SINNAPAN

B COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABDUL AZIZ RAHIM JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: K-02(NCVC)(W)-1089-05-2013]
C 15 MAY 2014

CONTRACT: *Building contract - Breach - Construction of bungalow 85% completed - Works could not be completed due to financial issues and problems with subcontractors - High Court held that contractor had* D *committed breach of contract and ordered to pay damages - Whether case pleaded - Whether trial judge erred*

CIVIL PROCEDURE: *Specific performance - Building contract - Construction of bungalow 85% completed - Works could not be completed due to financial issues and problems with subcontractors - High Court* E *held that contractor had committed breach of contract and ordered to pay damages - Whether case pleaded - Whether there was termination for non-performance pleaded*

In the High Court, the plaintiff ('the respondent') had filed an F action against the second defendant ('the appellant') for an order of specific performance of a building contract for the construction of a bungalow which was 85% complete. However, due to certain financial issues and difficulties encountered with subcontractors, works could not be completed. Clause 15 of the building contract G provided that vacant possession of the house was to be delivered to the respondent within 24 calendar months, failing which the appellant would have to pay the respondent the agreed liquidated damages calculated from day to day at 10% per annum on the sum which the respondent had already paid to the appellant. The H High Court held that the appellant had committed a breach of the building contract and ordered it to pay damages to the respondent. Hence, the present appeal. The appellant's arguments were that (i) the trial judge erred in holding that a breach of contract had occurred when that was never the respondent's I pleaded case. The respondent had never sought a declaration that the contract had been rescinded or terminated for non-

performance but had only sought specific performance or damages *in lieu* thereof; and (ii) that in any event, whatever damages to be allowed, whether *in lieu* of specific performance or otherwise, was contractually limited to the liquidated damages as expressly agreed and set out in cl. 15.2 of the building contract.

Held (allowing appeal)
Per Varghese George JCA delivering the judgment of the court:

(1) The trial judge had erred in holding that since the appellant was 'not capable of performing' its obligations, it had breached the contract and since no specific performance was ordered by the court, cl. 15.1 did not apply and that the respondent was entitled to damages arising naturally from the breach. The respondent had clearly prayed for an order for damages *in lieu* of specific performance for late delivery and not for damages arising independently. (paras 20 & 22)

(2) Nowhere in the statement of claim was there any allegation made nor declaration sought by the respondent to the effect that the building contract had been rescinded by non-performance. There was also no prayer for an order for damages for breach of contract. The trial had been proceeded with, all along, as an action for specific performance. It is trite law that parties were bound by their pleadings and the court was not entitled to decide on an issue not pleaded. The pleadings operated to define and limit with precision and clarity the matter in controversy between the parties and the court only had to adjudicate on those issues and no more. (paras 23 & 24)

(3) If the order for specific performance was declined by the court, the damages *in lieu* necessarily had to be in the nature of the reasonable costs or expenses incurred to complete the performance and not to restore the respondent to a situation of '*status quo ante*'. There was no specific evidence of such costs and expenses expected to be incurred led before the court. Any damages recoverable was limited to the amount derived from applying the expressly agreed liquidated damages formula set out in cl. 15.2 of the contract to constitute liquidated damages payable. The respondent did not challenge its adequacy or reasonableness. (paras 27, 30 & 38)

(4) The trial judge had disregarded the evidence that the appellant was willing and able to complete and deliver the building according to the building contract subject to appointment of new subcontractors. There was failure to consider that there had been substantial completion of the works and also failure to make necessary consequential adjustment for the benefit or advantage the respondent had thereby enjoyed. There was no rationale for the heads of damages awarded by the trial judge. (paras 25, 28 & 29)

(5) As the respondent never issued to the appellant a written notice of termination of the contract, he could not rely upon cl. 10.3 of the building contract. All the terms of the building contract remained binding upon the parties. Despite the existence of a 'time is of the essence' clause in the building contract, the respondent by his conduct did not insist on strict compliance with the deadline for handing over of vacant possession but had waited until 2012 to commence his action. In the circumstances, time was set at large. (paras 33, 34 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, plaintif ('responden') telah memfailkan satu tindakan terhadap defendan kedua ('perayu') bagi satu perintah pelaksanaan spesifik terhadap kontrak bangunan untuk pembinaan sebuah banglo yang 85% sempurna. Walau bagaimanapun, akibat beberapa isu kewangan dan masalah-masalah yang dihadapi berkenaan subkontraktor-subkontraktor, kerja-kerja tidak dapat disempurnakan. Klausa 15 kontrak bangunan memperuntukkan bahawa milikan kosong rumah tersebut harus diserahkan kepada responden dalam tempoh 24 bulan kalendar, yang mana jika gagal perayu perlu membayar kepada responden ganti rugi yang ditetapkan yang dikira hari ke hari pada kadar 10% setiap tahun ke atas jumlah yang responden telah bayar kepada perayu. Mahkamah Tinggi memutuskan bahawa perayu telah melanggar kontrak dan memerintahkan ia untuk membayar ganti rugi kepada responden. Oleh itu, rayuan ini. Hujahan-hujahan perayu adalah bahawa (i) hakim bicara terkhilaf dalam memutuskan bahawa berlakunya pelanggaran kontrak sedangkan ini bukanlah kes yang diplidkan oleh responden. Responden tidak pernah memohon deklarasi bahawa kontrak telah dibatalkan atau ditamatkan kerana ketidaklaksanaan tetapi hanya memohon pelaksanaan spesifik atau

ganti rugi sebagai ganti terhadapnya; dan (ii) bahawa dalam apa jua keadaan, sebarang ganti rugi yang dibenarkan, sama ada sebagai ganti bagi pelaksanaan spesifik atau sebaliknya, adalah terbatas secara kontrak kepada ganti rugi yang ditetapkan seperti yang dipersetujui secara nyata dan dinyatakan dalam kl. 15.2 kontrak bangunan.

Diputuskan (membenarkan rayuan)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara khilaf dalam memutuskan bahawa perayu 'tidak mampu melaksanakan' kewajipan-kewajipannya, telah melanggar kontrak dan oleh kerana tiada pelaksanaan spesifik yang diperintahkan oleh mahkamah, kl. 15.1 tidak terpakai dan bahawa responden berhak ke atas ganti rugi yang terbit secara semulajadi daripada pelanggaran. Responden jelas memohon bagi perintah untuk ganti rugi sebagai ganti bagi pelaksanaan spesifik atas kelewatan penyerahan dan bukan bagi ganti rugi yang terbit dengan tersendiri.

(2) Tiada mana-mana dalam penyata tuntutan yang menyatakan sebarang dakwaan mahupun deklarasi yang dipohon oleh responden yang memberi kesan bahawa kontrak bangunan telah dibatalkan akibat ketidaklaksanaan. Tidak terdapat juga permohonan bagi perintah untuk ganti rugi bagi pemecahan kontrak. Perbicaraan telah dimulakan, sepanjang masa, sebagai satu tindakan untuk pelaksanaan spesifik. Adalah undang-undang matan bahawa pihak-pihak terikat dengan pliding mereka dan mahkamah tidak boleh memutuskan isu yang tidak diplidkan. Pliding-pliding beroperasi untuk menggariskan atau membataskan dengan tepat dan jelas perkara-perkara yang dipertikaikan antara pihak-pihak dan mahkamah hanya perlu membicarakan isu-isu tersebut dan tidak lebih daripada itu.

(3) Sekiranya perintah untuk pelaksanaan spesifik ditolak oleh mahkamah, ganti rugi sebagai ganti perlu bersifat kos atau perbelanjaan munasabah yang dikeluarkan untuk menyempurnakan pelaksanaan dan bukan untuk mengembalikan responden kepada keadaan *'status quo ante'*. Tiada keterangan khusus mengenai kos dan perbelanjaan yang dijangka telah dikeluarkan, yang dikemukakan di mahkamah. Sebarang ganti rugi yang boleh dituntut balik terhad kepada jumlah yang diperolehi

daripada mengguna pakai formula ganti rugi yang ditetapkan yang termaktub dalam kl. 15.2 kontrak yang merupakan ganti rugi yang ditetapkan yang perlu dibayar. Responden tidak mencabar kecukupan atau kemunasabahannya.

(4) Hakim bicara telah mengabaikan keterangan bahawa perayu sanggup dan mampu untuk menyempurnakan dan menyerahkan bangunan sejajar dengan kontrak bangunan tertakluk kepada pelantikan subkontraktor-subkontraktor baru. Terdapat kegagalan untuk mempertimbangkan bahawa terdapat penyempurnaan besar kerja-kerja dan terdapat kegagalan untuk melakukan penyelarasan berbangkit bagi manfaat atau keuntungan yang responden nikmati. Tiada alasan bagi tajuk-tajuk ganti rugi yang diawardkan oleh hakim bicara.

(5) Oleh kerana responden tidak pernah mengeluarkan notis bertulis mengenai penamatan kontrak, dia tidak boleh bergantung kepada kl. 10.3 kontrak bangunan. Kesemua terma kontrak bangunan kekal mengikat pihak-pihak. Walaupun wujud klausa 'masa adalah penting' dalam kontrak bangunan, responden melalui tindakannya tidak menekankan dengan ketat, tarikh luput bagi menyerahkan milikan kosong tetapi menunggu hingga 2012 untuk memulakan tindakannya. Dalam hal keadaan ini, masa telah luas ditetapkan.

Case(s) referred to:

Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***

Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd [2002] 1 CLJ 261 CA ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74

For the appellant - Ang Khoon Cheong; M/s CP Ang & Co
For the respondent - Mohamad Fadzaial Ab Latif (Vignesh Perumal with him); M/s Farid Aziz & Co

[Appeal from High Court, Alor Setar; Civil Suit No: 22NCVC-110-4-2012]

Reported by Najib Tamby

JUDGMENT

Varghese George JCA:

[1] This and the further five appeals listed below were heard by us on 4 December 2013.

(i) K-02(NCVC)(W)-1086-05/2013
Foo Yee Construction Sdn Bhd
v.
Muthusivan a/l Ramakrishnan & 1 lagi

(ii) K-02(NCVC)(W)-1087-05/2013
Foo Yee Construction Sdn Bhd
v.
Chia Ah Bee

(iii) K-02(NCVC)(W)-1088-05/2013
Foo Yee Construction Sdn Bhd
v.
Saravanan a/l Ramachandra & 1 lagi

(iv) K-02(NCVC)(W)-1090-05/2013
Foo Yee Construction Sdn Bhd
v.
Ananthy a/p Marutha Muthu & 1 lagi

(v) K-02(NCVC)(W)-1091-05/2013
Foo Yee Construction Sdn Bhd
v.
Ravindran a/l Sinnapan

[2] It was agreed by the parties that our decision in this appeal would bind and be applicable in respect of the other appeals.

The appeals before us were against the decision of the learned trial judge at the Alor Star High Court, where similarly one decision of the court was agreed to bind all the respective respondents here.

[3] The respective respondents here were the plaintiffs at the High Court and in their separate suits had named the following as the defendants:

(1) ECK Development Sdn Bhd – first defendant;

(2) Foo Yee Construction Sdn Bhd – second defendant.

After a full trial the learned trial judge had dismissed the plaintiffs' action brought against the first defendant. There was no appeal presented against that part of the judgment of the High Court.

[4] With respect to the second defendant, the learned trial judge dismissed the plaintiffs' prayer for an order of specific performance. However the court proceeded to hold that the second defendant was in breach of contract and on that premise ordered the second defendant to pay the plaintiffs damages.

[5] For convenience of reference, the parties will be referred to in this grounds as they were at the High Court.

Background

[6] On 6 November 2006 the plaintiff entered into two agreements.

The first was with the first defendant for the purchase of a piece of land described as Plot 614 measuring 3605 sqf fit for a purchase consideration of RM63,464 (sale and purchase agreement).

The second was with the second defendant for the construction of a single-storey bungalow on the above described Plot 614 for a contract price of RM90,269 (building contract).

[7] It was not in dispute that the total purchase consideration for the land under the terms of the sale and purchase agreement had been settled by the plaintiff with the first defendant as of 1 December 2006.

Evidence led in court show that the plaintiff (together with another had obtained a loan in the sum of RM147,482 for purposes of the purchase of land and construction of the bungalow on Plot 614 from AmBank (M) Berhad on the security of a third-party assignment of the sale and purchase agreement in favour of the said financier. (The 'Loan Agreement – 3rd Party' and 'Assignment – 3rd Party' are both dated 23 November 2006).

[8] Documents admitted in evidence also show that the progress of the construction of the building had progressed up to 85% of the works and a total sum of RM76,728 towards the construction cost had been paid to the second defendant as of 10 May 2007.

[9] By cl. 15.1 of the building contract, vacant possession of the building with water and electricity connected was to be handed to the plaintiff within 24 calendar months of '... the date of acceptance of the loan by the owner (plaintiff) or within such other period as may be decided by the contractor's (2nd defendant's) consultant'.

It was not in dispute that the 24 months deadline for delivery of the building was to be calculated from 15 November 2006 (the date of the notice/demand by second defendant for the first release of progress payment from the approved loan sum) and accordingly the building was to be completed and delivered by 14 November 2008.

[10] This action was filed by the plaintiff on 29 April 2012.

Even at the date of trial the construction of the building had yet to be completed. SD2, the witness for the second defendant however testified that the construction works had been substantially completed as reflected by the 85% progress payment releases that had been paid to the second defendant. According to this witness certain financial issues and in particular difficulties encountered with sub-contractors had prevented the works from being fully completed. No definite date for hand over of vacant possession could be given as yet.

[11] The learned trial judge, as alluded to above, held that the second defendant had committed a breach of the contract and ordered the second defendant to pay the plaintiff damages in the following terms:

(a) The 'market value of the building'; this was qualified as follows '... the contract price of the building contract as the minimum price of the bungalow would have fetched on the market and that is the amount of damages allowed';

(b) Reimbursement of rental sum (as in the case of some of the plaintiffs), where documents such as tenancy agreements or receipts had been tendered in evidence;

(c) Refund of Mortgage Reducing Term Assurance premiums (MRTA) that had been paid; and

(d) Refund of legal fees on loan agreements.

Before Us

[12] The second defendant appealed against the whole of the decision of the High Court.

There were two principal contentions advanced in this respect. Firstly it was submitted that the learned trial judge fell into a fundamental error when Her Ladyship had held that there was a breach of contract when that was never the pleaded case of the plaintiff at all in this action.

It was highlighted that there was no alternative prayer in the suit for the contract to be declared as rescinded or terminated for non performance. The only relief sought was for specific performance and for 'damages *in lieu*' if such order was not granted by the court.

[13] Secondly, it was counsel's contention that in any event, whatever damages to be allowed (whether *in lieu* of specific performance or otherwise) was contractually limited to the liquidated damages as expressly agreed and set out in cl. 15.2 of the building contract, that is for the period of delay in completion and handing over of the building.

The award of damages, in terms of the 'market value of the building', repayment of rentals, MRTA and legal fees, as ordered by the learned trial judge was therefore wholly unsustainable.

[14] Counsel for the plaintiff on the other hand submitted that the learned trial judge was correct in holding that in all the circumstances of the matter, there had been a breach of contract

committed by the second defendant and accordingly pursuant to s. 74 of the Contracts Act 1950 the plaintiff was entitled to be awarded damages for all loss and expenses which naturally arose in the usual course of things.

[15] It was also counsel's argument that as there had occurred a default in the delivery of vacant possession, it was open to the plaintiff to rely on cl. 10.3 of the building contract and accordingly the damages recoverable from the second defendant was not limited to liquidated damages as stipulated or restricted by cl. 15.2 of the same agreement, in any event.

Our Assessment

[16] The pertinent starting point for our consideration was of course the pleadings by the parties.

The material parts of the plaintiff's claim and the relief sought were as found at para. 10, 11 and 12 and the prayers following that, in the statement of claim which are reproduced below:

> (10) Tetapi sehingga ke hari ini, Defendan-Defendan telah gagal dan/atau enggan meneruskan dan menyempurnakan dengan binaan hartanah tersebut serta telah gagal menyerahkan milikan kosong hartanah tersebut dalam masa sepertimana yang telah dicadangkan oleh Defendan-Defendan melalui 'Perjanjian Jual-Beli' dan 'Perjanjian Kontrak Bangunan'.
>
> (11) Akibatnya, Plaintif terpaksa menanggung rugi dan perlu membayar sewa rumah dan terpaksa menanggung beban faedah bank atas sebab kelewatan Defendan-Defendan untuk menyiapkan dan menyerahkan milikan kosong hartanah tersebut dalam tempoh yang ditetapkan.
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> (12) Plaintiff telah melalui peguamcaranya Tetuan Farid Aziz & Co. telah memberi notis bertarikh 09hb April 2012 kepada Defendan-Defendan bahawa Plaintiff inginkan Perlaksanaan Spesifik.
>
> OLEH YANG DEMIKIAN, Plaintiff menuntut daripada Defendan-Defendan:
>
> (i) Pelaksanaan Spesifik (Specific Performance);
>
> (ii) Ganti rugi alternative (Damages *in lieu*) atas Pelaksanaan Spesifik bagi kelewatan penyerahan milikkan kosong yang masih berjalan sehingga penyelesaiaan penuh;
>
> ...

[17] The defence to the aforesaid claim was set out at paras. 9 and 10 of the second defendant's statement of defence and was in the following terms:

> 9. Defendan Kedua sedang dan masih meneruskan dengan kerja-kerja pembinaan banglo tersebut. Pada semua masa berkenaan Defendan Kedua sudi dan bersedia melaksanakan obligasinya kepada Plaintiff di bawah Perjanjian Kontrak Bangunan. Selain daripada itu, perenggan 10 Pernyataan Tuntutan dinafikan.
>
> 10. Defendan Kedua menafikan Plaintif mengalami apa-apa kerugian atau sedang membayar sewa rumah atau beban faedah bank dan meletakkan Plaintiff kepada bukti-buktinya yang khusus. Selain daripada itu, perenggan 11 Pernyataan Tuntutan dinafikan.

[18] Clause 10 (insofar was material) and the whole of cl. 15 of the building contract that featured in the submissions of the respective counsel, are also reproduced here at the outset:

> 10. DEFAULT BY THE CONTRACTOR
>
> 10.1. Each of the following shall constitute an event of default:-
>
> 10.1.1. If the Contractor shall **wholly suspend** the execution of the construction of the said Building **without good cause** before practical completion;
>
> 10.1.2. ...
>
> 10.1.3. ...
>
> 10.1.4. ...
>
> 10.2. ...
>
> 10.3. **If any such event shall occur** then, and in any such case, but without prejudice to any other right, remedy or power contained in this Agreement or otherwise available to the Owner, this Agreement may be determined by the Owner **giving written notice to that effect** to the Contractor (such termination to take effect without prejudice to the rights of any party for antecedent breach).
>
> (emphasis added)

15. TIME FOR HANDING OVER OF VACANT POSSESSION

5.1. Vacant possession of the said Building to which water and electricity supply are ready for connection shall be handed over to the Owner within twenty-four (24) calendar months from the date of acceptance of the loan by the owner or within such other period as may be decided by the Contractor's consultant.

15.2. If the Contractor fails to hand over vacant possession of the said Building with water and electricity supply are *[sic]* ready for connection to the said Building, under Clause 15.1 above due to the fault of the Contractor, *then the Contractor shall pay to the Owner liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on the sum already paid by the Owner* to the Contractor under this Agreement.

(emphasis added)

[19] The learned trial judge, in our view, was correct when she held that the sale and purchase agreement (between the plaintiff and the first defendant) and the building contract agreement (between the plaintiff and the second defendant) were stand alone agreements to be construed separately in the factual context of this matter. (See para. 9 of the grounds).

[20] The learned trial judge however after referring to the pleaded relief sought by the plaintiff took the position that the plaintiff was '... claiming for specific performance and/or damages'. Her Ladyship went on to state: 'Plaintiff has not claimed specific performance and having abandoned that claim went for its alternative claim for damages'. (See para. 18 of the grounds).

This approach was in our assessment clearly erroneous as the full purport of that prayer (ii) pleaded, namely:

Gantirugi alternative **(damages *in lieu*) atas Perlaksanaan Spesific bagi kelewatan penyerahan** milikan kosong yang masih berjalan sehingga penyelesaian penuh ...

(emphasis added)

was clearly for an order for damages *in lieu* of specific performance for late delivery and not 'damages' arising independently.

[21] Further only at the stage of the closing submission before the High Court was it canvassed by the plaintiff that the contract had been breached (because the works had not been completed). The claim was modified to that effect, and in counsel's words, the plaintiff ought to be restored to the '*status quo*' by refund of all monies paid, so that it would serve as a 'deterrent' to errant parties like the defendants. (See 'I. Kesimpulan' in written submissions of plaintiff dated 7 March 2013).

[22] The learned trial judge went on then to state that since the second defendant was 'not capable of performing' its obligations it had breached the contract and since no specific performance was being ordered by the court, cl. 15.1 did not apply. Accordingly, the judgment of the High Court was that the damages the plaintiff was entitled to, was what would naturally arise in the course of things from the breach. (See paras. 21, 22 of the grounds).

[23] We considered the aforesaid reasoning and conclusion reached by the learned trial judge to be seriously flawed, for various reasons.

Firstly, it need to be noted that nowhere in the statement of claim was there any allegation made, and neither was there a declaration sought by the plaintiff, to the effect that the building contract had been rescinded by non performance. Further there was no prayer for an order for damages for breach of contract to be awarded or to be assessed. Prior to the trial or during the course of it, the plaintiff did not seek for any amendments to be made to the pleadings as well. The trial had been proceeded with all along as an action for specific performance of the building contract or for damages *in lieu* of such order for specific performance (and not in addition or as an alternative head of claim).

[24] Secondly, it was trite that parties were bound by their pleadings and the court was not entitled to decide a suit on an issue that was not pleaded. The pleadings operated to define and delimit with precision and clarity the matter in controversy between the parties and the court only had to adjudicate on those issues and no more. (*Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8. FC; [1969] 1 MLJ 22, *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615).

[25] Thirdly, the learned trial judge had disregarded the evidence of SD2 that the second defendant was willing and able to complete and deliver the building according to the building contract, subject to appointment of new subcontractors.

[26] More to the point, the Court of Appeal in the case of *Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd* [2002] 1 CLJ 261; [2000] 3 MLJ 310 had occasion in a somewhat similar context to observe as follows:

> The essence of the respondent's claim in the circumstances of this case is for specific performance and the claim for damages for breach of agreement must necessarily be regard as an alternative claim. They cannot get both remedies. If they claim for specific performance, they are treating the agreement as still subsisting and wants the other party to perform it. *If their claim is for damages for breach, they are treating the agreement as having come to an end and therefore incapable of being performed.* As stated earlier *the essence of the respondent's claim is for specific performance and once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach.* They therefore ought to amend their pleadings and without doing so, the learned judge ought not to have ordered damages to be awarded to them. *The respondent cannot be allowed to change the whole nature of their claim which essentially is a claim for specific performance, by turning it into an ordinary action for damages.* (See *Hipgrave v. Case* (1885) 28 Ch D 356).
>
> (emphasis added)

The learned trial judge had definitely misdirected herself in the application of the principles in this area of law, which had found affirmation in the above decision in *Labasama Group* case.

[27] The plaintiff was not here in this case, as pointed out earlier, seeking for a rescission of the contract (arising from failure of performance) but for its performance. If the order for specific performance was declined by the court, the damages *in lieu* had to necessarily be in the nature of the reasonable costs or expenses that would have to be incurred to complete performance (not to restore the plaintiff to the situation of '*status quo ante*'). Specific evidence of such costs and expenses expected to be incurred had to be led before the court. There was no such evidence before the court at all.

[28] Further, in making the orders as to the 'damages', the learned trial judge also omitted the undisputed fact that there had been substantial completion of the building works but had failed to make such necessary consequential adjustment for the benefit or advantage already enjoyed by the plaintiff thereby. By ordering, the 'market value' of the building (as per the contract value in the building contract), the plaintiff would appear to have been accorded an unfair gain from the value already put into the works by the second defendant.

[29] Similarly, there was no comprehensible rationale for the orders that the sums paid towards the MRTA and legal fees on the loan agreement ought to be refunded to the plaintiff.

Those outgoings, as it were, were in respect of the loan arrangement entered into by the plaintiff with AmBank (M) Berhad. There was no evidence shown that this arrangement had been terminated (in which case the loan would have been recalled) or aborted as a direct result of the delay in handing over of vacant possession of the building.

[30] We were in agreement with counsel for the second defendant who had submitted that, any such damage recoverable had to be limited to the amount derived by applying the expressly agreed formula set out at cl. 15.2 of the building contract, to constitute liquidated damages payable to the plaintiff.

[31] The plaintiff's contention in response to this, was that the plaintiff was entitled to invoke cl. 10.3 and in such a situation cl. 15.2 was no longer applicable. In other words, it was argued that the contract had come to an end by termination or rescission and cl. 15.2 was no longer binding on the parties.

[32] The fallacy behind this contention of the plaintiff however was that, if at all the plaintiff was to avail of that provision (cl. 10.3) to put to naught the building contract, the plaintiff had to first establish:

(a) that the second defendant had wholly suspended the execution of the building works without good cause before practical completion; and

(b) that the plaintiff had issued to the second defendant a written notice to determine the agreement.

[33] Upon being questioned by us, counsel for the plaintiff readily conceded that no such written notice of termination of the building contract had ever been issued to the second defendant by the plaintiff and the second limb as aforesaid had therefore not been satisfied in any case.

Further and more materially, the notice of 9 April 2012 issued by the plaintiff's solicitors to the defendants merely complained that "…as at to date you had wilfully and/or neglected *(sic)* and/or refused do *(sic)* comply with the terms of agreements and had failed to deliver vacant possession to our client pursuant to the agreement".

That notice went on to further state:

> In the above premises, we have no alternative but to proceed with legal action against you for the wilful conduct in not complying with the terms of the Agreement wherein our client has been put in substantial inconvenient *(sic)* due to your inaction in providing vacant possession.
>
> Further, TAKE NOTICE that we have our client's instructions that unless you revert to us with a written confirmation within Seven (7) days of this notice that you shall comply with the terms of the Agreement, failing which we shall have no alternative but to seek legal remedies including Order for Specific Performance.

[34] In our evaluation, that notice of 9 April 2012 was not intended to nor did it in any event have the effect of being the written notice by the plaintiff to determine the contract as contemplated by cl. 10.3 (for reason of wholly suspending the execution of the construction works) in order to take the plaintiff and the second defendant out of the purview of the terms of the building contract. Clause 10.3 of the building contract could not therefore be invoked by the plaintiff in this instance. All terms of the building contract therefore remained and was still binding upon the parties, including cl. 15.2, which specifically provided for the agreed measure of liquidated damages to be payable to the plaintiff in the event that there was a delay in the handing over of vacant possession of the building.

[35] It is noteworthy that the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 59 had recently ruled that there was no right to rescind a contract despite protracted delay (in handing over vacant possession there too) unless there has been total failure of consideration or non-performance of the contract in its entirety. Although some controversy lingers as to whether the 'fundamental breach test' or 'failure of performance of the contract in its entirety test' were the correct one to be applied before an order for rescission (for breach of contract) was allowed, the point to be noted was that in this *Berjaya Times Square* case, it was further stated that unless the contract was rescinded, the 'liquidated damages' clause subsist and would continue to bind the parties; damages recoverable were limited to the measure as therein agreed by the parties.

[36] In the fact situation before us, there was no fundamental breach (as 85% of the works was indisputably completed), and definitely no total failure of consideration or failure of performance of the contract in its entirety. Clause 15.2 continued to bind the parties where there was a delay in the handing over of vacant possession of the building.

[37] Despite the existence of a 'time is of the essence' clause (see cl. 3.1 of the building contract), what was obvious here was that by conduct, the plaintiff did not insist on the strict compliance of the deadline for handing over (November 2008) and had waited until 2012 to commence this action. In the circumstances time had been set at large. In the *Berjaya Times Square* case too, it was also ruled by the Federal Court that where there were both a 'liquidated damages clause for late delivery' and also a 'time is of the essence clause' in the same agreement, the expressly stated liquidated damages would necessarily mean that the 'time is of the essence clause' had been waived as to its strict effect.

[38] As regards the quantum of the liquidated damages agreed to be payable by the second defendant for late completion, firstly it should be stated that there was no challenge mounted by the plaintiff as to its adequacy or reasonableness.

It was our view that the formula spelt out in cl. 15.2 for calculation of damages was fair and reasonable in the circumstances as it was an interest payment of 10% p.a. imposed

on all monies that had been paid or disbursed by the financier from the approved loan sum to the second defendant towards construction of the building. It was not shown that such a sum was not sufficient to include within it, expenses incurred by the plaintiff to account of interest payment on the loan sum (already disbursed), any rental for alternate accommodation and other incidentals likely to be incurred for the duration between the expected date of completion and actual delivery of vacant possession.

[39] The law has also recognised that where it is difficult to assess damages or where no known measure of damages was employable or otherwise damages were incapable of accurate assessment, such sums stipulated as 'liquidated damages' in contracts were recoverable as a genuine pre-estimate of damages. (See *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817. FC; *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569; [2009] 4 MLJ 445, FC).

The majority decision in the Court of Appeal case of *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101 held that it was for a party challenging a liquidated damages clause in a contract, to demonstrate that it was unreasonable, exorbitant or unconscionable and that the courts would in any event generally preserve the sanctity of such a clause that had been freely entered into by the parties.

[40] It was our view that in the circumstances of the matter presented before the court, that the plaintiff ought to have chosen to terminate the building contract within reasonable time of the due delivery date or, by way of appropriate proceedings in court elected to treat the performance of the contract as having been terminated (repudiated) by the second defendant. This was not the nature of the suit here. It bears repetition, that this was an action for an order for specific performance as the principal remedy and, for damages *in lieu*, if specific performance was not granted.

[41] Having given anxious consideration to the matters in issue and the submissions of counsel for the parties in this appeal before us, we were of the unanimous view that the learned trial judge had misdirected herself on the facts and the law in context of the pleadings before the court and the evidence led at trial. This

merited appellate intervention. On the facts in evidence, the plaintiff, in our view, was entitled to an order for specific performance as sought.

[42] We were constrained therefore to allow the appeal. All the orders of the learned trial judge were set aside and substituted with the following:

(a) the plaintiff (appellant) be entitled to specific performance of the building contract; and

(b) the plaintiff be at liberty to claim for damages for delay in delivery of vacant possession in accordance with the liquidated damages agreed and payable by the second defendant under cl. 15.2 of the building contract, until date of hand over of the building.

(A similar order was to apply in respect of the plaintiffs in each of the other five cases as well).

We also ordered costs to the second respondent in the sum of RM15,000 both here and at the trial court on an overall basis.